

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONNIE G. JOHNSON
Claimant

VS.

RSI HOLDING CORP./PRESTIGE
Respondent

AND

TRAVELERS PROP. CAS. CO. OF AMER.
Insurance Carrier

Docket Nos. **1,037,677**
& 1,045,173

ORDER

Claimant requests review of the February 5, 2010 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

On March 5, 2009, claimant fell at work and alleges that he injured his neck, shoulder and back. The Administrative Law Judge (ALJ) found claimant failed to sustain his burden of proof that his shoulder and neck injury arose out of and in the course of employment. But the ALJ determined claimant had provided timely notice of the accident to the respondent.

Claimant requests review of whether the ALJ erred in finding claimant's neck and left shoulder injuries did not arise out of and in the course of employment.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

A summary of the procedural history of these docketed claims is necessary. In Docket No. 1,037,677, claimant filed an application for hearing alleging a left knee injury. This accidental injury was not disputed and claimant received ongoing medical treatment for his left knee but continued to work.¹

On March 5, 2009, claimant fell at work. Claimant filed another claim, Docket No. 1,045,173, alleging injury to his left lower extremity, left hip, shoulder and back. On June 24, 2009, a preliminary hearing was held on this docketed claim and the ALJ found:

The Court finds that the Claimant's injury (neck and shoulder) most likely was caused by a normal day to day activity without any hazard of employment. The Court acknowledges that the Claimant fell on a concrete slab, but there was no evidence represented that turned this condition into a hazard. Likewise the Claimant was unable to describe the cause of his fall. Benefits requested are denied pending further hearing.²

Neither party appealed this order to the Board.

Claimant then amended his application for hearing in Docket No. 1,037,677 to include the alleged injuries suffered in the fall on March 5, 2009. Claimant alleged that his fall was caused by his injured left knee giving out and, as a consequence, the injuries he suffered were a natural and probable consequence of the admitted left knee injury.

On February 3, 2010, a preliminary hearing was held on Docket No. 1,037,677. Claimant again sought medical treatment for the injuries suffered in his fall on March 5, 2009. But during the preliminary hearing the parties agreed to consolidate both docketed cases and to consider the evidence from the June 24, 2009 preliminary hearing as part of the evidentiary record in the February 3, 2010 preliminary hearing.

The ALJ issued his order on February 5, 2010, and again determined claimant failed to sustain his burden of proof that his shoulder and neck injury arose out of and in the course of his employment. The ALJ found:

The Court finds that the Claimant met his burden to provide notice. His testimony on that point is credible. The Court finds that the Claimant has failed to meet his burden to prove that he sustained an injury that arose out of and in the course of his employment in this case. His prior inconsistent statements about the mechanism of injury is inconsistent with his testimony today, and the Court finds that the

¹ Ultimately, the treatment for the left knee injury required a total knee replacement but that surgery occurred after the March 5, 2009 accidental injury which is the subject of this appeal.

² ALJ Order (Jun. 26, 2009).

Claimant has not met his burden to show an injury that arose out of and in the course of his employment.³

The claimant appealed the decision.

Turning to the evidence regarding the accident on March 5, 2009, the claimant described his injury as follows:

I was getting ready to leave and the plant manager, Dennis Blaylock and Terry Trout was standing there and he asked if I could stay an hour late. I said yes, let me get my glucose meter and put it in my truck so I don't forget because I am a diabetic. When I was coming back in I don't know if I tripped on my feet and my leg went out on me and I went down and landed on my left side.⁴

The claimant told his foreman about the fall and was directed to tell his supervisor, Mike Tigner. Claimant spoke with his supervisor and showed him where he had scraped his knee in the fall. But claimant did not ask for medical treatment at that time and continued working. On March 23, 2010, claimant filled out an accident report and was referred for an appointment with Dr. Cummins that same day. The doctor's progress note from that appointment includes a history that claimant's bad knee gave way causing the fall.⁵ After failed attempts to schedule an appointment with Dr. Cummins, claimant sought medical treatment for his shoulder and back with his family physician, Dr. Bacani. Dr. Bacani recommended some chiropractic treatments which claimant received twice from Dr. Nichols. He also was prescribed hydrocodone for pain.

Because additional treatment had been denied, the matter proceeded to preliminary hearing. At the June 24, 2009 preliminary hearing the claimant had testified, as previously noted, that he didn't know if he tripped on his feet, his leg went out on him and he fell. He later testified that he did not know if he tripped on his own feet or his knee went out. Claimant testified:

Q. All right, now you said you don't know if you tripped on your own feet or if your knee went out, is that right?

A. Correct.⁶

³ ALJ Order (Feb. 5, 2010).

⁴ P.H. Trans. (Jun. 24, 2009) at 8.

⁵ *Id.*, Cl. Ex. 1.

⁶ *Id.* at 11.

When claimant testified at the February 5, 2010 preliminary hearing he explained that after he had injured his left knee it had become unstable and on occasion had given out on him. Before the March 5, 2009, incident the claimant had seen Dr. Edward J. Prostic on February 15, 2008, for treatment recommendations regarding his left knee. Dr. Prostic's report contained a history that claimant had episodes where his left knee had given way. Claimant further testified that his left knee had given out on March 5, 2009 and that is why he fell. On cross-examination claimant testified:

Q. When, your testimony today is that your knee gave out and you fell. Did I understand that right?

A. Yes, sure do.

Q. Now when you testified in June of last year you described what happened on two occasions. The first comment was on Page 8 of the Preliminary Hearing transcript and, Judge, I would ask that you include the transcript from our prior hearing as part of our record here today.

THE COURT: It's part of the record of the case.

BY MR. TOWNSLEY:

Q. Okay, on Page 8 at line 15 you were describing what happened and you said to Ms. Trimble,

"When I was coming back in I don't know if I triped on my feet and my leg went out on me and I went down and landed on my left side."

Do you recall that?

A. Yes.

Q. You were asked again by Ms. Trimble on Page 11 and that's at line 16, and says,

"All right, now you said you don't know if you tripped on your own feet or if your knee went out, is that right?"

A. Yes.

Q. Okay, do you remember how you answered that question?

A. No, I sure don't.

Q. Your answer says, correct. In other words at that time you didn't know whether you tripped on your feet or if your knee went out. Is that a fair statement?

A. Yes.

Q. Today what you are saying is that your knee went out?

A. Yes.

Q. You didn't trip on your feet?

A. No.⁷

The claimant argues that his left knee gave out and he fell injuring his neck, left shoulder and back. When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁸ But where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause, it would not be compensable.⁹

In *Jackson*¹⁰, the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1)

In this case there is no dispute that on March 5, 2009, the claimant fell at work. The ALJ concluded claimant had provided inconsistent histories of the cause for his fall when he had testified at the two separate preliminary hearings. While claimant was unsure of the exact cause for his fall when he testified at the first preliminary hearing, nonetheless, Dr. Cummins' progress note offered as an exhibit at that hearing contained a history that the fall was caused by claimant's previously injured left knee giving out. Moreover, Dr. Prostic's report prepared before the March 5, 2009 fall at work corroborated claimant's testimony that he had suffered episodes where his left knee had given out. This Board member concludes the claimant has met his burden of proof that his fall was caused by his previously injured left knee giving out. Stated another way, the March 5, 2009 fall was a natural and probable consequence of claimant's left knee injury suffered in Docket No. 1,037,677. Accordingly, the ALJ's Order is reversed.

⁷ P.H. Trans. (Feb. 3, 2010) at 13-15.

⁸ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁹ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

¹⁰ *Jackson v. Stevens Well Service*, *supra*.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹²

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated February 5, 2010, is reversed and remanded to the Administrative Law Judge for further orders consistent herewith.

IT IS SO ORDERED.

Dated this 30th day of April 2010.

DAVID A. SHUFELT
BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
William L. Townsley III, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

¹¹ K.S.A. 44-534a.

¹² K.S.A. 2009 Supp. 44-555c(k).